

SENATE BILL 2178
By Norris

AN ACT to amend Tennessee Code Annotated, Title 29,
Chapter 26, Part 1, relative to malpractice.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 29-26-119, is amended by deleting the section in its entirety and by substituting instead the following:

§ 29-26-119.

(a) In a malpractice action in which liability is admitted or established, the damages awarded may include (in addition to other elements of damages authorized by law) actual economic losses suffered by the claimant by reason of the personal injury including, but not limited to, the cost of reasonable and necessary medical care, rehabilitation services and custodial care, loss of services and loss of income. Such damages shall be awarded only to the extent that such costs are not paid or payable, replaced, discounted, forgiven or indemnified in whole or in part, pursuant to:

- (1) The United States Social Security act;
- (2) Any state or federal income disability or worker's compensation act;
- (3) Any health, life, sickness or income-disability insurance;
- (4) Any accident insurance that provides health benefits or income-disability coverage; or
- (5) Any contract or agreement of any group, organization, partnership or corporation to provide, pay for or reimburse the cost of medical, hospital, dental or other health care services.

(b) No source of collateral benefits, identified within subsection (a), shall recover any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against a defendant.

(c) In a malpractice action in which liability is admitted or established, the damages awarded may include (in addition to other elements of damages authorized by law) noneconomic losses; provided, however, damages for such noneconomic losses shall not exceed two hundred fifty thousand dollars (\$250,000).

(d) As used in subsection (c), "noneconomic damages" means, without limitation, damages for physical and emotional pain and suffering, discomfort, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium, injury to reputation, and all other nonpecuniary losses of any kind or nature. This term does not include past or future:

- (1) Medical expenses, including rehabilitation and therapy;
- (2) Wages or earnings capacity;
- (3) Income;
- (4) Funeral and burial expenses;
- (5) The value of services performed by the injured in the absence of the injury or death including those domestic and other necessary services performed without compensation; or
- (6) Other similar monetary expenses.

(e)

(1) In any malpractice action the trial court shall, at the request of either party, enter a judgment ordering that money damages or its equivalent for future damages of the judgment creditor be paid in whole or in part by periodic payments rather than by a lump-sum payment if the award equals or exceeds

seventy-five thousand dollars (\$75,000) in future damages. In entering a judgment ordering the payment of future damages by periodic payments, the court shall make a specific finding as to the dollar amount of periodic payments that will compensate the judgment creditor for such future damages. As a condition to authorizing periodic payments of future damages, the court shall require the judgment debtor who is not adequately insured to post security adequate to assure full payment of such damages awarded by the judgment. Upon termination of periodic payments of future damages, the court shall order the return of this security, or so much as remains, to the judgment debtor.

(2)

(A) The judgment ordering payment of future damages by periodic payments shall specify the recipient or recipients of the payments, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made. Such payments shall only be subject to modification in the event of the death of the judgment creditor.

(B) If the court finds that the judgment debtor has exhibited a continuing pattern of failing to make the payments, as specified in subdivision (A), then the court shall find the judgment debtor in contempt of court and, in addition to the required periodic payments, shall order the judgment debtor to pay the judgment creditor all damages caused by the failure to make such periodic payments, including court costs and attorney's fees.

(3) Money damages awarded for loss of future earnings shall not be reduced or payments terminated by reason of the death of the judgment creditor,

but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately prior to the judgment creditor's death. In such cases, the court that rendered the original judgment may, upon petition of any party in interest, modify the judgment to award and apportion the unpaid future damages in accordance with this subsection.

(4) Following the occurrence or expiration of all obligations specified in the periodic payment judgment, any obligation of the judgment debtor to make further payments shall cease and any security given, pursuant to subdivision (1) shall revert to the judgment debtor.

(5) As used in this subsection:

(A) "Future damages" includes damages for future medical treatment, care or custody, rehabilitation services, loss of future earnings, loss of bodily function, or future pain and suffering of the judgment creditor.

(B) "Periodic payments" means the payment of money or delivery of other property to the judgment creditor at regular intervals.

SECTION 2. Tennessee Code Annotated, Section 29-26-120, is amended by deleting the language "not to exceed thirty-three and one-third percent (33 1/3%) of all damages awarded to the claimant." and by substituting instead the following:

not to exceed the following limitations:

(1) Forty percent (40%) of the first fifty thousand dollars (\$50,000) of damages recovered;

(2) Thirty-three and one-third percent (33 1/3%) of the next fifty thousand dollars (\$50,000) recovered;

(3) Twenty-five percent (25%) of the next five hundred thousand dollars (\$500,000) recovered;

(4) Fifteen percent (15%) of any amount on which the recovery exceeds six hundred thousand dollars (\$600,000).

Such limitations shall apply regardless of whether the recovery is by means of settlement, arbitration or judgment, and regardless of whether the person for whom the recovery is made is a responsible adult, infant or person of unsound mind.

If periodic payments are awarded to the plaintiff pursuant to § 29-26-119, then the court shall place a total value on such payments based upon the life expectancy of the plaintiff and shall utilize such total value in computing the total award from which attorney's fees are calculated under this section.

SECTION 3. Tennessee Code Annotated, Section 29-26-115, is amended by designating the existing language of subsection (b) as (b)(1) and by adding the following new (b)(2):

(2) No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by subsection (a), unless the person was licensed to practice in the same specialty as the defendant. The court may waive this subdivision when it determines that the appropriate witnesses otherwise would not be available.

SECTION 4 Tennessee Code Annotated, Section 29-26-117, is amended by deleting the language "may state a demand" and substituting instead the language "shall state a demand".

SECTION 5. Tennessee Code Annotated, Title 29, Chapter 26, Part 1, is amended by adding the following as a new section:

§ 29-26-122.

(a) In any action for damages alleging professional malpractice against a health care professional licensed by the state, the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify pursuant to 29-26-115(b), which affidavit shall set forth specifically at least one (1) negligent act or omission claimed to exist and the factual basis for each such claim.

(b) If a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges with specificity, by motion to dismiss filed on or before the close of discovery, that the affidavit is defective, the plaintiff's complaint is subject to dismissal for failure to state a claim, except that the plaintiff may cure the alleged defect by amendment within thirty (30) days of service of the motion alleging that the affidavit is defective. The trial court may, in the exercise of its discretion, extend the time for filing such amendment or response to the motion, or both, as it shall determine justice requires.

(c) If a plaintiff fails to file an affidavit as required by this section and the defendant raises the failure to file such an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, such complaint shall not be subject to refiling provisions after the expiration of the applicable period of limitations unless a court determines that the plaintiff had the requisite affidavit within the time required by this section and the failure to file the affidavit was the result of excusable neglect.

SECTION 5. Tennessee Code Annotated, Title 29, Chapter 26, Part 1, is further amended by adding the following as a new section:

§ 29-26-123.

(a) Upon motion by the prevailing party at the time that the verdict or judgment is rendered, the moving party may request that the finder of fact

determine whether the opposing party presented a frivolous claim or defense. In such event, the court shall hold a separate bifurcated hearing at which the finder of fact shall make a determination of whether such frivolous claims or defenses were asserted and to award damages, if any, against the party presenting such frivolous claims or defenses. As used in this subsection:

(1) "Frivolous claims" shall include, but are not limited to, the following:

(A) A claim, defense, or other position that lacks substantial justification;

(B) A claim, defense, or other position that is not made in good faith or that is made with malice or a wrongful purpose;

(C) A claim, defense, or other position with respect to which there existed such a complete absence of any justifiable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position; or

(D) A claim, defense, or other position that was interposed for delay or harassment.

(2) Damages awarded pursuant to this subsection may include, without limitation, reasonable and necessary attorney's fees and expenses of litigation.

SECTION 6. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 7. This act shall take effect January 1, 2006, the public welfare requiring it.